

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOY R. SPENCER and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Akron, OH

*Docket No. 97-2719; Submitted on the Record;
Issued September 17, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's actual wages as a modified mark-up clerk fairly and reasonably represent her wage-earning capacity; and (2) whether appellant met her burden of proof in establishing that modification of the wage-earning capacity determination was warranted.

On April 29, 1988 appellant filed a notice of traumatic injury and claim, alleging that on April 5, 1988 she sustained injuries to her back while in performance of duty. The Office accepted appellant's claim for lumbar strain and herniated nucleus pulposus. The Office also authorized surgery for a laminectomy in February 1989. Appellant returned to work on January 27, 1990 for five hours a day. On September 19, 1996 she received a rehabilitation job offer for a position as a modified mark-up clerk working eight hours a day. The Office determined that this position was suitable and provided appellant 30 days to accept the offer. On September 23, 1996 appellant accepted the offered position. In a decision dated December 23, 1996, the Office determined that appellant had been recently reemployed as a mark-up clerk effective September 28, 1996. The Office found that this position fairly and reasonably represented appellant's wage-earning capacity and was suitable for her accepted medical condition. The Office reduced appellant's compensation to zero based on her actual earnings as a modified mark-up clerk. By decision dated July 17, 1997, an Office hearing representative affirmed the Office's December 23, 1996 decision, that appellant no longer had any loss of wage-earning capacity and had been reemployed as a modified mark-up clerk.

The Board has duly reviewed the entire case record on appeal and finds that the Office properly determined that appellant's actual earnings as a modified mark-up clerk fairly and reasonably represented her wage-earning capacity.

Once the Office accepts a claim, it has the burden of proving that the disability ceased or lessened in order to justify termination or modification of compensation. Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal

employment conditions given the nature or the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.¹ Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity.² Generally wages earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.³ After the Office determines that appellant's actual earnings fairly and reasonably represent his or her wage-earning capacity, application of the principles set forth in the *Alfred C. Shadrick*⁴ decision will result in the percentage of the employee's loss of wage-earning capacity.⁵

In the present case, appellant was reemployed by the employing establishment effective September 28, 1996, with actual earnings for her work as a modified mark-up clerk. The evidence of record reveals that appellant's date-of-injury salary was \$ 487.69 per week. When appellant accepted the position as a modified mark-up clerk, appellant returned to work at a higher rate of pay than her date-of-injury salary. Consequently appellant was reemployed at a higher salary than she had been receiving on her date of injury. Based on the evidence of record, appellant's actual earnings as a modified mark-up clerk fairly and reasonably represented her wage-earning capacity as there was no evidence to the contrary and the Office properly determined that there was no loss of wage-earning capacity.

The Board also finds that the issue of whether appellant established that modification of the loss wage-earning capacity determination is not in posture for decision.

Once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained, or the original determination was in fact erroneous. The burden of proof is on the party seeking modification of the award.⁶

Appellant contended that she no longer could work eight hours a day and submitted a report by Dr. Barry Greenberg, a Board-certified orthopedic surgeon. In a report dated October 15, 1996, Dr. Greenberg indicated that appellant began experiencing back and leg pain anew when she started working eight hours a day. He noted that physical examination revealed

¹ See generally 5 U.S.C. § 8115(a), *The Law of Workmen's Compensation* § 57.22 (1989); see also *Betty F. Wade*, 37 ECAB 556 (1986).

² 5 U.S.C. § 8115(a); *Clarence D. Ross*, 42 ECAB 556 (1991).

³ *Hubert F. Myatt*, 32 ECAB 1994 (1981).

⁴ 5 ECAB 376 (1953).

⁵ See *Hattie Drummond*, 39 ECAB 904 (1988); *Shadrick*, *supra* note 4.

⁶ *Don J. Mazuek*, 46 ECAB 447 (1995); *Odessa C. Moore*, 46 ECAB 681 (1995).

thoracolumbar curvature with subluxation at the L3-4 level and that multilevel decompression laminectomy surgery would be necessary in the near future. Dr. Greenberg concluded that appellant could not continue to work eight hours a day in the “vigorous” job for the employing establishment. Although the Office hearing representative rejected this opinion based on his finding that appellant was performing limited-duty work which required minimal exertion, this finding is not consistent with appellant’s description of her duties which the Office hearing representative reviewed. Appellant testified that the only accommodation made to her duties was that she did not have to lift trays off the rack to perform her work. Appellant’s position required her to type on mechanized and unmechanized terminals, labeling, sweeping, copying but no xeroxing, which required her to stand in one place, sending second class mailers, prepping light bags of which 50 percent were under 20 pounds and occasionally answering the phone. Given the type of duties appellant was required to perform, Dr. Greenberg’s characterization of appellant’s job as “vigorous” is not clearly erroneous and there is no medical evidence in the record which contradicts his assessment.

Thus, while the report by Dr. Greenberg is not sufficient to establish that modification of the loss of wage-earning capacity determination is warranted due to a material change in appellant’s condition, the Board finds that this report, given the absence of evidence to the contrary, is sufficient to require further development of the evidence. The Board notes that when an employee initially submits supportive factual and/or medical evidence, which is not sufficient to carry the burden of proof, the Office must inform the claimant of the defects in proof and grant at least 30 calendar days for the claimant to submit the evidence required to meet the burden of proof. The Office may undertake to develop either factual or medical evidence for determination of the claim.⁷ It is well established that proceedings under the Act are not adversarial in nature,⁸ and while the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence.⁹ The Office has the obligation to see that justice is done.¹⁰

In the present case, there was an uncontroverted inference of a material change in the nature or extent of appellant’s accepted condition. The Office is obligated to request further information from appellant’s treating physician regarding how this change impacts appellant’s disability and medical condition. On remand, the Office should further develop the evidence by providing Dr. Greenberg with a statement of accepted facts, including an accurate job description and request that he submit a rationalized medical opinion on whether appellant’s accepted condition materially changed after she began working eight hours a day. After such development as the Office deems necessary, a *de novo* decision shall be issued.

⁷ 20 C.F.R. § 10.11(b); *see also John J. Carlone*, 41 ECAB 354 (1989).

⁸ *See, e.g., Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985); *Michael Gallo*, 29 ECAB 159 (1978).

⁹ *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

¹⁰ *William J. Cantrell*, 34 ECAB 1233 (1983).

The decision of the Office of Workers' Compensation Programs dated July 17, 1997, is affirmed in part, set aside in part and this case is remanded for further proceedings consistent with this decision. The decision of the Office dated December 23, 1996 is hereby affirmed.

Dated, Washington, D.C.
September 17, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member